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Ng Pak Mui v Tay Mary & Ors

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-558–11 OF 2020
ONG CHEE KWAN JC
11 APRIL 2022

C *Companies and Corporations — Derivative action — Leave to file derivative action against directors — Shareholder-applicant contended directors had deliberately made misrepresentations in financial reports of company to give impression company was able to declare and distribute dividends without becoming insolvent — Applicant proposed by way of derivative action to recover for company* D *from the directors dividends they had 'unlawfully' declared and distributed — Whether applicant failed to show she was acting in good faith and that derivative action was prima facie in best interest of company — Whether derivative action appeared to be designed to achieve several ulterior motives of applicant — Whether applicant could not show good cause of action which had* E *reasonable prospect of success existed to warrant grant of leave — Companies Act 2016 s 133(2)*

The plaintiff was the wife of one Dato' Tan, deceased, who was the founder, funder, chairman of the board of directors and controlling mind and will of the F seventh defendant, Desaminium Jaya Sdn Bhd ('the company'). The first defendant, ('D1') was Dato' Tan's mother. Dato' Tan's estate held the majority (52%) of the shares in the company, the plaintiff held 5% of the shares while the remaining 43% of shares were held by the first to the sixth defendants ('D1 to D6') who were the directors of the company. Following Dato' Tan's death, G the High Court granted probate of his will to two of the plaintiff's children ('TRM' and 'TAL'). The company, however, filed an action ('Suit 662') to nullify the will, inter alia, on the ground that it was a forgery and to set aside the grant of probate and have D1 declared as a 25% beneficiary under Dato' Tan's estate in intestacy. In Suit 662, the company and D1 obtained an order H restraining the plaintiff and her children from holding themselves out as the beneficiaries and/or executors of Dato' Tan's estate. TRM and TAL had earlier demanded that the company register the transmission of all of Dato' Tan's shares in their names as executors of his estate and to appoint them and their youngest sibling and the plaintiff as additional directors in the company. TRM I and TAL also contended that D1 to D6 held their shares in the company on trust for Dato' Tan's estate and should not deal with the shares without their consent. In addition to Suit 662, two other suits ('Suit 674' and 'Suit 887') were brought against the company by the plaintiff and by the estate of Dato' Tan seeking repayment of advances made to the company. Against the

backdrop of these suits, the plaintiff filed the instant originating summons ('OS') pursuant to ss 347 and 348 of the Companies Act 2016 ('the CA') for leave to file a derivative action for and on behalf of the company against D1 to D6 on the ground that they had breached their statutory and fiduciary duties in, inter alia, causing the company to declare and distribute a huge sum in dividends to shareholders when the company was not financially healthy. The plaintiff alleged that D1 to D6 had caused material misrepresentations to be made in the company's financial statements — specifically the audited financial statements for the years ended 2017 and 2018 ('AFS 2017' and 'AFS2018') — which gave the impression that the company would not be insolvent (ie, it would be able to pay its debts as and when they became due) within the 12 months immediately after the distribution of dividends was made. Via the derivative action, the plaintiff proposed to recover for the company from D1 to D6 the dividends that, she alleged, were 'unlawfully' declared and paid out in breach of ss 131 and 132 of the CA. To support her leave application, the plaintiff tendered a report of a chartered accountant and company auditor ('BTMHG') whom she had engaged to provide an expert opinion on whether AFS 2018 gave a true and fair view of the company's financial position. D1 to D6 submitted that the plaintiff's leave application was not bona fide but made for the purpose of taking over control of the company, revenging the actions that D1 and the company took to nullify Dato' Tan's will and the grant of probate and also to undermine the company's and D1's position in the ongoing suits they had with the plaintiff and her children. D1 to D6 said the derivative action was not in the best interest of the company and was misconceived as the company was in a position to declare and pay out dividends without becoming insolvent.

Held, dismissing the leave application:

(1) The plaintiff's specific complaints on there being mis-statements in the directors' report, statement of directors, statutory declaration and unqualified auditors report for AFS 2017 and AFS 2018 were untenable (see para 95).

(2) The leave application rested entirely on the BTMHG reports. Evaluating both the BTMHG reports and the defendants' BDO reports, it was clear that there was insufficient material to establish that the plaintiff honestly believed that the company had a good cause of action which had a reasonable prospect of success as required by s 348(4)(a) of the CA (see paras 96–97).

(3) There was ample evidence that the plaintiff's leave application was not bona fide but motivated by a collateral purpose. Significantly, the plaintiff sought ancillary orders to require the company's directors, auditors and solicitors to disclose and provide full information concerning the affairs of the company, to obtain unlimited and full

inspection of the company's books and records and to make copies of the documents aforesaid to be used in all or any of the court proceedings against the company's directors as well as other third parties not named in the plaintiff's OS. This clearly smacked of collateral purpose and bad faith as part of the information sought might be protected by legal professional privilege, including but not limited to any information passed between the company and its solicitors in respect of Suit 662 and/or Suit 674 wherein the plaintiff was an opposing party thereto (see paras 98 & 112).

(4) The plaintiff appeared to be using the intended derivative action to advance or champion her and/or her children's own interests and personal agenda, be it to put pressure on Suit 662 or to bolster their positions in Suit 674 or Suit 887 as well as to take over control of the company by seeking a court order to remove D1 to D6 as directors of the company and appoint the plaintiff and/or her nominees as the new directors (see paras 113–114 & 116–117).

(5) The proposed derivative action was premised upon the claim that the company was not solvent in the sense that it would not be able to pay its debts as and when the debts became due within the 12 months immediately after the distribution of dividends was made (per s 132(3) of the CA). The dividends were declared in December 2018 to all the shareholders. It was significant that right up to the time of the hearing of the leave application, there was no evidence that the company was not able to pay its debts as and when they became due since December 2018. Plaintiff's counsel had also admitted that no shareholder or creditor of the company was prejudiced by the declaration of the dividends (see paras 120–124).

(6) The proposed derivative action was not in the best interest of the company because, inter alia, it compelled the company to formally adopt the plaintiff's position that it was liable to repay on demand the advances that were made by shareholders, that it was insolvent when the distribution of dividends was made in December 2018 and that there was material mis-statements in its audited financial statements. All of these positions were diametrically opposite to the positions that the company held at all times, especially in Suit 674 and Suit 887 which were still pending before the courts (see paras 119 & 125–128).

[Bahasa Malaysia summary

Plaintif adalah isteri kepada seorang Dato' Tan, si mati, yang merupakan pengasas, pembiaya, pengerusi lembaga pengarah dan pemilik defendan ketujuh, Desaminium Jaya Sdn Bhd ('syarikat tersebut'). Defendan pertama, ('D1') adalah ibu Dato' Tan. Harta pusaka Dato' Tan memegang majoriti (52%) saham dalam syarikat, plaintif memegang 5% saham manakala baki

43% saham dipegang oleh defendan pertama hingga keenam ('D1 hingga D6') yang merupakan pengarah syarikat tersebut. Berikutan kematian Dato' Tan, Mahkamah Tinggi membenarkan probet Wasiatnya kepada dua daripada anak plaintif ('TRM' dan 'TAL'). Syarikat tersebut, bagaimanapun, memfailkan guaman ('Guaman 662') untuk membatalkan wasiat tersebut, antara lain, atas alasan bahawa ia adalah pemalsuan dan mengetepikan pemberian probet dan telah D1 diisytiharkan sebagai benefisiari 25% di bawah harta pusaka Dato' Tan dalam keadaan tidak berwasiat. Dalam Guaman 662, syarikat dan D1 memperoleh perintah yang menghalang plaintif dan anak-anaknya daripada menganggap diri mereka sebagai benefisiari dan/atau wasi harta pusaka Dato' Tan. TRM dan TAL sebelum ini menuntut syarikat tersebut mendaftarkan penukaran semua saham Dato' Tan atas nama mereka sebagai wasi harta pusakanya dan melantik mereka serta adik bongsu mereka serta plaintif sebagai pengarah tambahan dalam syarikat. TRM dan TAL juga berpendapat bahawa D1 hingga D6 memegang saham mereka dalam syarikat atas amamah untuk harta pusaka Dato' Tan dan tidak sepatutnya berurusan dengan saham tersebut tanpa kebenaran mereka. Sebagai tambahan kepada Guaman 662, dua saman lain ('Guaman 674' dan 'Guaman 887') telah dikemukakan terhadap syarikat oleh plaintif dan oleh harta pusaka Dato' Tan untuk mendapatkan bayaran balik pendahuluan yang dibuat kepada syarikat. Berlatarbelakangkan saman ini, plaintif memfailkan saman pemula semasa ('OS') menurut ss 347 dan 348 Akta Syarikat 2016 ('AS') untuk kebenaran memfailkan tindakan terbitan untuk dan bagi pihak syarikat terhadap D1 hingga D6 atas alasan bahawa mereka telah melanggar kewajipan berkanun dan fidusiari mereka, antara lain, menyebabkan syarikat mengisytiharkan dan mengagihkan sejumlah besar dividen kepada pemegang saham apabila syarikat tidak sihat dari segi kewangan. Plaintif mendakwa bahawa D1 hingga D6 telah menyebabkan salah nyata material dibuat dalam penyata kewangan syarikat — khususnya penyata kewangan audit untuk tahun berakhir 2017 dan 2018 ('AFS 2017' dan 'AFS2018') — yang memberi gambaran bahawa syarikat tidak akan muflis (iaitu, ia akan dapat membayar hutangnya apabila ia perlu dibayar) dalam tempoh 12 bulan sejurus selepas pembahagian dividen dibuat. Melalui tindakan terbitan, plaintif mencadangkan untuk mendapatkan semula bagi syarikat dari D1 hingga D6 dividen yang, didakwanya, telah diisytiharkan secara 'tidak sah' dan dibayar dengan melanggar ss 131 dan 132 AS. Untuk menyokong permohonan kebenarannya, plaintif telah mengemukakan laporan akauntan bertauliah dan juruaudit syarikat ('BTMHG') yang telah dilantiknya untuk memberikan pendapat pakar sama ada AFS 2018 memberikan pandangan yang benar dan saksama tentang kedudukan kewangan syarikat. D1 hingga D6 mengemukakan bahawa permohonan kebenaran plaintif adalah tidak bona fide tetapi dibuat untuk tujuan mengambil alih kawalan syarikat, membalas dendam terhadap tindakan yang diambil oleh D1 dan syarikat untuk membatalkan wasiat Dato' Tan dan pemberian probet dan juga untuk melemahkan kedudukan syarikat dan D1 dalam saman berterusan mereka dengan plaintif dan anak-anaknya. D1 hingga

A D6 berkata tindakan terbitan tersebut bukan untuk kepentingan terbaik syarikat dan disalah anggap kerana syarikat berada dalam kedudukan untuk mengisytiharkan dan membayar dividen tanpa menjadi muflis.

Diputuskan, menolak permohonan kebenaran:

B (1) Aduan khusus plaintif mengenai terdapat salah nyata dalam laporan pengarah, penyata pengarah, akuan berkanun dan laporan juruaudit tidak layak untuk AFS 2017 dan AFS 2018 tidak boleh dipertahankan (lihat perenggan 95)

C (2) Permohonan kebenaran bergantung sepenuhnya pada Laporan BTMHG. Menilai kedua-dua laporan BTMHG dan laporan BDO defendan, adalah jelas bahawa terdapat bahan yang tidak mencukupi untuk membuktikan bahawa plaintif secara jujur percaya bahawa syarikat mempunyai kausa tindakan yang baik yang mempunyai prospek kejayaan yang munasabah seperti yang dikehendaki oleh s 348(4)(a) AS (lihat perenggan 96–97).

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(3) Terdapat banyak keterangan yang mencukupi bahawa permohonan kebenaran plaintif tidak bona fide tetapi didorong oleh tujuan cagaran. Secara ketara, plaintif memohon perintah sampingan untuk menghendaki pengarah, juruaudit dan peguam cara syarikat mendedahkan dan memberikan maklumat penuh mengenai hal ehwal syarikat, untuk mendapatkan pemeriksaan tanpa had dan penuh ke atas buku dan rekod syarikat dan membuat salinan dokumen yang disebutkan di atas untuk digunakan dalam semua atau mana-mana prosiding mahkamah terhadap pengarah syarikat serta pihak ketiga lain yang tidak dinamakan dalam OS plaintif. Ini jelas bercanggah dengan tujuan cagaran dan niat jahat sebagai sebahagian daripada maklumat yang dicari mungkin dilindungi oleh keistimewaan profesional undang-undang, termasuk tetapi tidak terhad kepada sebarang maklumat yang diluluskan antara syarikat dan peguam caranya berkenaan dengan Guaman 662 dan/atau Guaman 674 di mana plaintif adalah pihak yang menentangnya (lihat perenggan 98 & 112).

H (4) Plaintif nampaknya menggunakan tindakan terbitan yang dimaksudkan untuk memajukan atau memperjuangkan kepentingan dan agenda peribadinya dan/atau anak-anaknya sendiri, sama ada untuk memberi tekanan kepada Guaman 662 atau untuk mengukuhkan kedudukan mereka dalam Guaman 674 atau Guaman 887 juga untuk mengambil alih kawalan syarikat dengan mendapatkan perintah mahkamah untuk mengeluarkan D1 hingga D6 sebagai pengarah syarikat dan melantik plaintif dan/atau penamanya sebagai pengarah baharu (lihat perenggan 113–114 & 116–117).

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(5) Tindakan terbitan yang dicadangkan adalah berdasarkan dakwaan

bahawa syarikat tersebut tidak solven dalam erti kata ia tidak akan dapat membayar hutangnya apabila dan apabila hutang itu perlu dibayar dalam tempoh 12 bulan sebaik selepas pembahagian dividen dibuat (sebagaimana s 132(3) AS). Dividen telah diisytiharkan pada Disember 2018 kepada semua pemegang saham. Ia adalah penting bahawa sehingga masa pendengaran permohonan kebenaran, tiada bukti bahawa syarikat tersebut tidak dapat membayar hutangnya apabila dan apabila ia perlu dibayar sejak Disember 2018. Peguam plaintif juga telah mengakui bahawa tiada pemegang saham atau pemiutang syarikat telah prejudis dengan pengisytiharan dividen (lihat perenggan 120–124).

(6) Tindakan terbitan yang dicadangkan bukanlah untuk kepentingan terbaik syarikat kerana, antara lain, ia memaksa syarikat untuk menerima pakai secara rasmi kedudukan plaintif bahawa ia bertanggungjawab untuk membayar balik apabila diminta pendahuluan yang dibuat oleh pemegang saham, bahawa ia adalah tidak solven apabila pengagihan dividen dibuat pada Disember 2018 dan terdapat salah nyata ketara dalam penyata kewangan auditnya. Kesemua jawatan ini adalah bertentangan sama sekali dengan jawatan yang dipegang oleh syarikat pada setiap masa, terutamanya dalam Guaman 674 dan Guaman 887 yang masih belum selesai di hadapan mahkamah (lihat perenggan 119 & 125–128).]

Cases referred to

Celcom (M) Bhd v Mohd Shuaib Ishak [2011] 3 MLJ 636, CA (refd)
Dato' Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd (in liquidation)) v Kuan Leo Choon & Ors [2012] 10 MLJ 706, HC (refd)
Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd [2019] 10 MLJ 693, HC (refd)
Mahbubul Matin v Firoze Muhammad Zahidur Rahman & Anor [2019] MLJU 1585, HC (refd)
Tracy Chang & Anor v Sunildeep Singh Dhaliwal & Ors (unreported), HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 181A, 181B, 365(1)
Companies Act 2016 ss 131, 131(1), 132, 132(2), 132(3), 133, 133(2), 215(1)(b), 244, 249, 251, 347, 348, 348(4), 348(4)(a)

Nahendran Navaratnam (with Lim Cheng Bock, Prem Ramachandran, Wong Wye Wah and Lee Shoue Jie) (Kumar Partnership) for the plaintiffs.
Robert Low (with James Khong and Chong Lip Yi) (James Khong) for the defendants.

Ong Chee Kwan JC:

INTRODUCTION

[1] Enclosure 1 is an application by the plaintiff for leave to commence a derivative action ('leave application') under ss 347 and 348 of the Companies Act 2016 ('the CA 2016') on behalf of and for the benefit of the seventh defendant, Desaminium Jaya Sdn Bhd ('the company') against the first to sixth defendants as directors of the company.

[2] The intended derivative action is based on ss 131, 132 and 133 of the CA 2016. These sections provide:

131 Distribution out of profit

(1) Subject to section 132, a company may only make a distribution to the shareholders out of profits of the company available if the company is solvent.

(2) the company, every officer and any other person or individual who contravene this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding three million ringgit or to both.

...

132 Distribution only if company is solvent

(1) Before a distribution is made by a company to any shareholder, such distribution shall be authorised by the directors of the company.

(2) The directors may authorize a distribution at such time and in such amount as the directors consider appropriate, if the directors are satisfied that the company will be solvent immediately after the distribution is made.

(3) For the purposes of this section, the company is regarded as solvent if the company is able to pay its debts as and when the debts become due within twelve months immediately after the distribution is made

...

133 Recovery of distribution

(1) the company may recover from a shareholder any amount of distribution paid to the shareholder which exceeds the value of any distribution that could properly have been made, unless the shareholder —

(a) has received the distribution in good faith; and

(b) has no knowledge that the company did not satisfy the solvency test required under subsection 132(3).

(2) Every director or manager of a company who wilfully pays or permits to be paid any dividend in contravention of section 131 or 132, which he knows

from his knowledge is not profits shall also be liable to the company to the extent of the amount exceeded the value of any distribution of dividends that could properly have been made.

...

[3] The intended derivative action is premised on the plaintiff's complaints that the first to sixth defendants as directors of the company, had acted in breach of their statutory and fiduciary duties as they had:

(a) caused material misstatements to be made in the audited financial statements for year ended 2018 ('AFS 2018') and audited financial statements for year ended 2017 ('AFS 2017') of the company in breach of ss 244, 249 and 251 of the CA 2016 so as to facilitate the declaration and distribution of dividends in breach of ss 131 and 132 of the CA 2016.

(b) falsely recording in the company's financial statements the amount of RM197,220,150 ('RM197m') owed by its wholly owned subsidiary, Desaminium Maju Sdn Bhd ('the subsidiary') as 'current asset' when there is no prospect of recovering the RM197m from the subsidiary within 12 months from the accounting date of 12 June 2019 given that the subsidiary's auditors had cast 'significant doubt' on its ability to continue as a going concern;

(c) failing to impair the RM197m recorded as an asset in the financial statements of the company, which sum is not fully recoverable and has been due and owing from the subsidiary to the company since 2004 in breach of the approved accounting standards and s 244 of the CA 2016

(d) misclassifying the inventories' balances, comprising completed properties with a carrying value of RM12,864,671 which had been completed since financial year 2007, under 'current assets' as 'inventories' instead of 'investment properties';

(e) falsely and/or wrongly reporting its financial statements that an amount of RM8,015,931 ('RM8m') owing to shareholders which is recorded as 'repayable on demand', to be a 'non-current liability';

(f) failing to recognize the aforesaid RM8m owing to shareholders and unpaid dividends of RM11,519,700 ('RM11.5m') payable to the estate of Dato' Tan Tiang Kwong ('Dato' Tan') and the plaintiff as 'current liabilities' for the period ending 31 December 2018; and

(g) falsely reporting that the dividends were fully distributed as at 31 December 2018, when the estate to Dato' Tan and the plaintiff were never paid the RM11.5m of the dividends declared in 2018.

[4] Although the plaintiff has alleged breaches by the first to sixth defendants of ss 244, 249 and 251 of the CA 2016, which if established, would expose the company and every officer who commits the offence with fine and or imprisonment, for the purpose of the leave application to commence the proposed derivative action, the plaintiff is looking specifically at the company recovering from the first to sixth defendants under s 133(2) of the CA 2016 the dividends that the plaintiff claimed were unlawfully declared in breach of ss 131(1) and 132 of the CA 2016.

BACKGROUND FACTS

[5] The plaintiff is a shareholder of the company whereas the first to sixth defendants are the current directors and shareholders of the company representing the minority 43% of the shareholders ('the minority directors'). The remaining 57% shares are held by the plaintiff (5% shareholding) and the estate of Dato' Tan (52% shareholding) respectively. Dato' Tan was the plaintiff's husband.

[6] The plaintiff claimed that during his lifetime, Dato' Tan was the founder, funder and the controlling mind and will of the company. He was also chairman of the board of directors and in control of the decision making process and day-to-day management of the company. Dato' Tan passed away on 1 December 2017, leaving a last will and testament dated 15 January 2017 ('will'). grant of probate of Dato' Tan's estate was granted to two of the plaintiff's children, Tan Ruy Mun and Tan Ai Lin, on 30 March 2018.

[7] However, pursuant to a citation by the first and second defendants dated 17 August 2018, the grant of probate was delivered up to the Central Probate Registry at the Kuala Lumpur High Court on 12 September 2018. Thereafter, the first defendant and the company commenced an action against the plaintiff and her children vide Kuala Lumpur High Court Suit No WA-22NCVC-662–10 of 2018 ('Suit 662'), seeking to nullify the will, set aside the grant of probate and have the first defendant (Dato' Tan's mother) declared a 25% beneficiary of Dato' Tan's estate under intestacy. Suit 662 is still pending at the time of the hearing of this leave application.

[8] In fact, pursuant to an order of court dated 3 February 2020 in Suit 662 obtained by the first defendant and the company, the plaintiff and her children are restrained from holding themselves out as beneficiaries of Dato' Tan's estate while two of the plaintiff's children, Tan Ruy Mun and Tan Ai Lin are restrained from acting as the executors pursuant to the will. By a further order of court dated 3 February 2020 in Suit 662, one Lim Tian Huat has been appointed the receiver and manager of the estate. More will be said of the Suit 662 later.

[9] Consequently, the Minority Directors, being the remaining incumbent board of directors at the time of Dato' Tan's untimely demise are in control of the company. The plaintiff and the estate of Dato' Tan had made requests to be appointed directors of the company but such requests had not been acceded to by the defendants.

[10] Sometime in 2019, the plaintiff instructed her daughter, Tan Ai Lin, to purchase a copy of the AFS 2018 from the Companies Commission of Malaysia ('SSM'). The plaintiff claimed that she had not received AFS 2018 from the company.

[11] According to the plaintiff, upon a cursory review of AFS 2018, the plaintiff discovered that the company had declared dividends of RM20.21m in 2018 ('dividends'). According to the AFS 2018, the entirety of the dividends had been paid out to the shareholders. The plaintiff claimed that neither the plaintiff nor Dato' Tan's estate had received their respective portions of the dividends after the declaration of the same, contrary to what was reported in AFS 2018.

[12] In truth, Dato' Tan's estate only received its portion of the dividends sometime in June 2020, approximately 18 months after the dividends were declared and stated as distributed by 31 December 2018.

[13] As regards the plaintiff, she has refused to collect her portion of the said dividends as she maintained that the declaration of the dividends is wrongful.

Alleged wrongful declaration of dividends

[14] The plaintiff had engaged a chartered accountant and an approved company auditor, namely Mr Heng Fu Joe from Messrs Baker Tilly Monteiro Heng Governance Sdn Bhd ('BTMHG') to provide his expert opinion on whether AFS 2018 gives a true and fair view of the financial position of the company. His findings, contained in BTMHG report (1), BMTHG report (2) and BTMHG report (3) can be summarised as follows:

(a) since the plaintiff and Dato' Tan's estate did not receive their portion of the dividends as at 31 December 2018, 'it appears' that there is a potential understatement of liabilities of RM11,519,700 in AFS 2018 and such understatements are material as they affect both total current assets and total current liabilities;

(b) the company did not have an unconditional right to defer settlement of RM8,015,931 owing to the shareholders and RM16,082,163 owed to the directors as both these amounts had been disclosed by the directors as being 'repayable on demand' in AFS 2018. There was found a

'potential' misclassification of RM8,015,931 being the amount owing to the shareholders as 'non-current liabilities';

(c) there was a 'potential' misclassification of the inventories of RM12,864,671 as 'current assets'. The company did not appear to have satisfied the criteria in section 4.5 of the Malaysian Private Entities reporting Standard ('MPERS') to classify the inventories as 'current assets';

(d) there 'appears' to be a material uncertainty on the ability of the subsidiary to continue as a going concern and therefore its ability to repay the amount owing to the company. Consequently, a portion of RM197,220,150 being the amount owed by the subsidiary should be impaired. This would result in a decrease in the net current assets and retained earnings of the company;

(e) there was a 'potential' misclassification of RM197,220,150 as 'current assets' as the company could not expect to realise the amount owing by the subsidiary within 12 months after the reporting date. The subsidiary has a current asset consisting of cash of RM100 only as at 31 December 2018. The subsidiary's sole current asset of RM100 is insufficient to satisfy its current liability of RM197,220,150 to the company;

(f) pursuant to ISA 450 Evaluation of Misstatements Identified during the audit, the auditor of the company, TE Lim & Co was required to modify his opinion with regards to AFS 2017 and AFS 2018 as misstatements have been identified which are material to the audited financial statements as a whole and after taking into consideration the potential misstatements, 'it appears' that the company was not able to pay its debts as and when they fell due in the normal course of business within 12 months immediately after distribution of the dividends.

[15] The plaintiff claimed that the BTMHG's findings bear out the fact that the first to sixth defendants had exaggerated the net current assets and retained earnings and had decreased the current liabilities in order to falsely portray a solvent position for the company.

[16] Armed with the aforesaid, the plaintiff proceeded with the filing of the leave application to commence the proposed derivative action by the company that the declaration and payment of the dividends contravened ss 131 and 132 of the CA 2016.

[17] Section 131 of the CA 2016 introduced the concept of the 'solvency test' which stipulates that a company may make a distribution out of profits provided that the company is solvent. Section 132(2) and (3) provides that a company is regarded as solvent if it is able to pay its debts as and when it

becomes due within 12 months immediately after the distribution of dividends is made. The plaintiff contended that this means the company's current assets must exceed its current liabilities.

[18] Therefore, the classification of assets and liabilities as 'current' or 'non-current' is important as it affects the solvency position of the company in relation to the declaration of the dividends. The dividends should not be declared and paid if such payment will cause the company to be insolvent. Sections 131 and 132 require the directors to be satisfied that the company will be solvent after the distribution is made.

[19] The plaintiff claimed that it is the defendants' misclassification of the current and non-current assets which resulted in the company falsely fulfilling the solvency test in order to facilitate the distribution of the sum of RM20.21m as dividends. That by reason of the wrongful declaration, the company may recover the dividends paid in contravention of ss 131 and 132 from the first to sixth defendants under s 133(2) of the CA 2016.

The defendants' position

[20] The defendants have produced BDO report (1), BDO report (2) and BDO report (3) prepared by one, Mr Sanjay Sidhu, from BDO Governance Advisory Sdn Bhd ('BDO') to rebut the findings made by BTMHG ('the BDO reports').

[21] The defendants contended that the leave application is not made in good faith but for a collateral purpose that is purely personal to the plaintiff. In particular:

(a) the leave application is the plaintiff's retaliation to the ongoing litigation brought by the company and the first defendant for forgery of the will propounded by the plaintiff and her children over the assets of her late husband, Dato' Tan;

(b) the plaintiff is seeking to seize control of the company through the proposed derivative action; and

(c) it is also commenced with the intention to undermine the various ongoing litigations involving the plaintiff and/or her children as against the company and/or the first defendant.

[22] The defendants further contended that there is no justification for leave to be granted:

A (a) the leave application is grounded on misstatements of material facts by the plaintiff. There has also been no wrongdoing by the first to sixth defendants which warrants the granting of the leave sought; and

(b) the company is at all times solvent.

B

[23] Further, the defendants contended that it is not prima facie in the best interest of the company for leave to be granted to the plaintiff to litigate in the name of the company. In particular:

C (a) it is within reasonable contemplation that upon obtaining the order for access to the company's records as proposed under the intended derivative action, the company's legal privilege in relation to the series of ongoing litigations with the plaintiff and her children would be undermined from within;

D (b) further, in the course of the leave application, both the company and the plaintiff have engaged their own experts to review the accounts vis a vis the complaints of the plaintiff. The plaintiff's expert has confirmed, inter alia, that there is nothing improper in the impugned declaration and distribution of the dividends. In the circumstances, should leave be granted for the plaintiff to commence the derivative action, the company would be put to take a position contrary to its own and adverse to its interest; and

E

(c) in addition, it is clear from this application that there is a real risk that F the plaintiff intends to subordinate the interest of the company to her collateral purpose by having the company take the position that it was insolvent as at the time of declaration and distribution of dividends.

COURT'S DELIBERATION

G

[24] The predecessors to ss 347 and 348 of the CA 2016 were ss 181A and 181B of the Companies Act 1965 ('the CA 1965'). Decided cases on the interpretation of the predecessor sections have been held to be applicable on the interpretation of ss 347 and 348 of the CA 2016.

H

[25] The requirements for the grant of leave are ascribed in s 348 of the CA 2016. It is pertinent to note that the meeting of these requirements is evaluative in that they must be met. There is no room for discretion to grant leave if any I of these requirements has not been fulfilled. The language employed by s 348 of the CA 2016 amplifies this.

[26] There is no dispute that the plaintiff, as one of the company's shareholders, come within the statutory meaning of 'complainant' and are thus

clothed with the necessary locus standi to make the application. There is also no dispute that the necessary statutory 30 days' notice has been given. A

[27] For our present purposes, sub-s (4) of the section stipulates that the court 'shall take into account' whether: B

(a) the complainant is acting in good faith; and

(b) it appears prima facie to be in the best interest of the company that the application for leave is granted.

C

[28] The obligation to show that these requirements have been met is on the plaintiff. The threshold imposed upon the plaintiff is not a low one, but one that has to be tested strictly (see: *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636 at pp 646D-F and 654F (CA); *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2019] 10 MLJ 693 at p 719F (HC); *Tracy Chang & Anor v Sunildeep Singh Dhaliwal & Ors* (unreported) at paras [47]–[49] (HC) and *Mahbubul Matin v Firoze Muhammad Zahidur Rahman & Anor* [2019] MLJU 1585). D

[29] The test of good faith is two fold: E

(a) first, there must be an honest belief on the part of the complainant that a good cause of action exists and that it has a reasonable prospect of success. This would not simply be a matter of bald assertion; and

(b) secondly, the application must not have been brought up for a collateral purpose. F

[30] In the evaluation of good faith, based on the judgment of Justice Darryl Goon (now JCA) in *Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd* [2019] 10 MLJ 693 at p 719F (HC), the court would consider: G

(a) whether the complainant honestly believed that there is a good cause of action with a reasonable prospect of success exists. This is a subjective test;

H

(b) whether the complainant's said honest belief is one where no reasonable person in the circumstances could hold that belief. This is an objective test;

(c) on the issue of collateral purpose, the fact that there is disagreement between opposing factions would not per se be indicative of any collateral purpose or bad faith. However, where there are disagreements or significant disputes between the opposing factions, courts should be alert to the possibility that there might exist a collateral purpose; I

A (d) an underlying purpose of furthering a dispute or to create controversy or to disrupt the opposing party's management of a company would be regarded as pursuing a collateral purpose; and

(e) a collateral purpose need not be elaborate.

B

[31] Further, there can be an overlap between the factors relevant to the requirement of good faith and what is prima facie in the best interest of the company. To be in the best interest of a company:

C (a) the proposed claim must be genuine, namely that the company must have a good or reasonable cause of action coupled with one that has a reasonable prospect for success based on substantive grounds;

(b) commercial considerations are relevant, including the question of whether the company stands to gain substantially in money or in D money's worth; and

(c) even if a proposed derivative action may be meritorious, a company may have genuine commercial considerations for not pursuing it.

E **[32]** As regards the threshold test for leave to be granted, in *Mahbubul Matin v Firoze Muhammad Zahidur Rahman & Anor* [2019] MLJU 1585, Her Ladyship Justice Noorin bt Badaruddin after referring to the Court of Appeal decision of *Celcom (Malaysia) Bhd v Mohd Shuaib Ishak* quoted the following passage at p 10 of the judgment which bears reminding when deliberating F whether leave ought to be granted to commence a derivative action:

> [8] ... The intention of ss 181A to E of the CA is to enable a member, present or past, to seek leave to bring an action in the name of the company to recover losses sustained by that company. As such, leave to bring a derivative action must not be given lightly (see *Swansson v RA Pratt Properties Pty Ltd & Anor* [2002] NSWSC G 583). Thus, once leave is granted the defendants in this case cannot revisit the issue on the grant of leave. Granting leave is therefore final in that sense and not interlocutory in character. In this respect, the learned judge was wrong in stating cursorily that the matter before him was 'only an application for leave' and relying on the low threshold used under O 53 of the RHC (application for judicial review) ie, to determine if an application for judicial review is not frivolous or vexations by H relying on cases like *Clear Water*. The learned judge must as a matter of judicial prudence exercise a greater caution in satisfying himself that the requirements under s 181A of the CA 1965 are met. A low threshold of merely determining if there existed a prime facie case is therefore a wrong basis for granting the leave. There needs to be a strict interpretation of s 181A of the CA 1965, and compliance to I those statutory requirements (see *Charlton v Baber* 21 ACIC 1671).

[33] During oral submissions, learned counsel for the plaintiff took pain to remind this court not to delve into the merits of the plaintiff's proposed derivative action contending that the court at the leave stage needs only be

satisfied that the plaintiff has shown that its proposed cause of action is not frivolous and that it suffices once serious questions or issues have been shown to exist for the plaintiff's proposed derivative action.

[34] With respect, I disagree.

[35] Whilst it is true that at the stage of an application for leave under s 348 of the CA 2016, it is not necessary for the court to determine that the proposed derivative action will in all likelihood succeed, the court is nevertheless required to be satisfied that the proposed cause of action has a 'good prospect of success'. The fact that the proposed cause of action is one that is not bound to fail is insufficient. Further, that the plaintiff has raised serious questions to be tried in support of her intended derivative action is likewise also not sufficient.

[36] The reason why a higher threshold test is needed is obvious. When leave is granted, the court is essentially committing the resources of the company to be used to pursue a course of action which the company in its wisdom and judgment does not deem it to be in its interest to do. In addition, once leave is granted, it will almost always lead to serious disruption to the operation and management of the company, not to mention the uncertainties and angst that may arise in dealing with the ambit of access to documents claimed to be relevant to the intended action.

[37] Accordingly, in every application for leave to commence a derivative action under s 348, the court is duty bound to give more than a mere cursory examination of the allegations raised by the parties. An appreciation of the proposed cause of action, the facts and the law applicable in support of the proposed cause of action need to be examined.

[38] As the plaintiff is seeking to commence a derivative action under s 133(2) of the CA 2016, it is necessary to understand the company's said statutory rights under the provision.

[39] Section 133 deals with the recovery of distribution made under s 131 of the CA 2016.

[40] In respect of the liability of the directors in declaring dividends without complying with the statutory provisions, the High court in the case of *Dato' Gan Ah Tee & Anor (in their capacity as liquidators of Par-Advance Sdn Bhd (in liquidation)) v Kuan Leo Choon & Ors* [2012] 10 MLJ 706, dealing with s 365(1) of the CA 1965 which is the predecessor to s 131 of the CA 2016, held that the directors were personally liable when the declaration of dividend was made in breach of s 365(1) of the CA 1965:

A [23] In *Winkworth v Edward Baron Development Co Ltd* [1987] 1 All ER 114, at p 118 (HL), Lord Templeman said:

> *A duty is owed by the directors* to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.

B ...

[39] The general law relating to payment of dividends out of the company's profits is undoubted. However, in the circumstances of this case, a liability had been C adjudged which if taken into account by the first and third defendants as the directors, would render the company without any or with substantially insufficient 'retained profits' to pay out any dividends. *There is virtually no or insignificant profits to declare dividends. The fact and evidence are clear enough in the instant case that the defendants cannot be allowed to base on the incorrect or untrue account to declare and* D *pay out company's money as dividends*.

...

[42] *The first defendant is not a stranger but a director/trustee of the company. As a director, he owed a duty to the company to ensure that the company funds were properly managed. By signing the resolutions to declare dividends and by signing the payment* E *cheques to pay out dividends, his signatures were irrefragable evidence of his assent to the declarations of dividends and the payment of the dividends from the company's funds*. Thus, he must be taken to have been knowingly assisting the third defendants in the removing of the company's monies in the form of dividend payments with the intent to defraud the creditors of the company when there was in existence an award F of RM4.3m which if taken into account, would clearly render the company without any sufficient 'Retained Profits' to declare and pay any dividends at all.

[41] However, under s 133(2) of the CA 2016, only a director 'who wilfully G pays or permit to be paid any dividend in contravention of ss 131 or 132, which he knows from his knowledge is not profits shall be liable to the company to the extent of the amount exceeded the value of any distribution of dividends that could properly have been made'.

H **[42]** The word 'wilful' necessarily means that the said director must have intentionally or deliberately pay the dividends even though he knows the dividends paid were not from the profit of the company and or that the dividends could not have been properly made by the company.

I **[43]** In the instant case, the plaintiff is claiming that the first to sixth defendants as directors of the company had deliberately or intentionally misstated several material items in the company's AFS 2017 and AFS 2018 so that the company would be reflected as solvent immediately after the distribution is made in December 2018. But for these misstatements, the

company would not have met the solvency test stipulated in s 132 of the CA 2016.

[44] This means that the distribution of the dividends was wrongful and could not have been properly made. It is said that as directors of the company, the first to sixth defendants are responsible for the preparation of the financial statements of the company and must therefore be taken to have knowledge of the misstatements made thereto.

[45] Accordingly, in order for this court to evaluate the plaintiff's proposed cause of action, it is necessary for this court to examine in some details the alleged misstatements in AFS 2017 and AFS 2018 raised by the plaintiff.

ALLEGED MISSTATEMENTS IN THE COMPANY'S AFS 2017 AND AFS 2018

[46] The plaintiff based her honest belief that the company has a bona fide cause of action under s 133(2) of the CA 2016 on specific alleged misstatements in the company's audited financial statements for AFS 2017 and AFS 2018. Each of these alleged misstatements shall be dealt with below.

Classification of RM197m owed by the subsidiary as 'current asset'

[47] The plaintiff's first specific complaint is in respect of the classification of the amount owing by the subsidiary to the company. Issue is taken with the alleged misclassification of the amount owing by the subsidiary as 'current assets' of the company on the basis that the same allegedly has no prospect of recovery.

[48] More specifically, it is contended that the auditors of the subsidiary had cast 'significant doubt' on the ability of the subsidiary to continue 'as a going concern'. This means that its ability to repay the full amount owing to company is put into doubt. Consequently, it is said that a portion of RM197,220,150 being the amount owed by the subsidiary should be impaired.

[49] As a result of the aforesaid, the classification of RM197,220,150 as 'current assets' is wrong as the company could not expect to realise the amount owing by the subsidiary within 12 months after the reporting date. Reference is made to the fact that the subsidiary has a current asset consisting of cash of RM100 only as at 31 December 2018. Its sole current asset of RM100 is insufficient to satisfy its current liability of RM197,220,150 to the company.

[50] With respect, the opinion by BTMHG fails to take into regard the historical background facts relating to the incorporation of the subsidiary and

A the underlying arrangement between the company and the subsidiary which had led to the sum RM197,220,150 being the owed by the subsidiary to the company.

B **[51]** The subsidiary is a wholly owned subsidiary of the company. It is an investment holding company. It was incorporated with the purpose of purchasing from the company ten subdivided lots being part of the lands developed by the company ('ten lots').

C **[52]** It was intended that the subsidiary would sell all or any part of the ten lots to other third parties after all or any part of the ten lots have appreciated in value. As such, the subsidiary does not yield any revenue or income pending the sale of all or any part of the ten lots. Instead, the company, as the parent company, would pay for the administrative expenses incurred by the subsidiary. D This has been the arrangement from the very inception of the subsidiary and known to all the directors of the company including Dato' Tan.

[53] The amount recorded in the company's audited financial statements for AFS 2017 and AFS 2018 as amount owing by the subsidiary is in connection E with the pending sale of the ten lots and payment for the subsidiary's administrative expenses by the company aforesaid.

[54] At all material times, the sale of the ten lots by the company to the F subsidiary is predicated upon an understanding that the subsidiary would repay its amount owing to the company only upon the successful completion of the sale of all or any part of the ten lots.

[55] The sale of the ten lots was done during Dato' Tan's lifetime. the G company's board of directors, including Dato' Tan, had also approved a board of directors' resolution for the sale of the ten lots. In this regard, the board of directors, including Dato' Tan, was advised that there would also be a tax advantage to this transaction.

H **[56]** In fact, the respective sale and purchase agreements for each of the ten lots provides for a payment mechanism which takes into account the understanding aforesaid. More specifically, the respective sale and purchase agreements provides as follows:

I (a) that the purchase price for each of the ten lots shall be treated as an unsecured loan from the company to the subsidiary; and

(b) that the purchase price for each of the ten lots shall be payable in full by the subsidiary to the company within seven days of a written notice of demand issued by the company.

[57] Consistent with the understanding aforesaid, the company has not issued any demand to the subsidiary yet because the subsidiary has not been able to sell all or any part of the ten lots as, amongst others, the individual titles for each of the ten lots were not issued until recently in October 2020. In fact, even during Dato' Tan's lifetime, the company did not issue any demand to the subsidiary.

[58] As there have been no demands made as yet, the question as to the recoverability of the amount is premature at this juncture as it is still open for the company or the subsidiary to sell the ten lots or any part thereof in the meantime. From 2004 until 2020, the company did periodically write and or call to the Selangor Land Office and or other relevant authorities to follow up on the status of the re-alienation of the surrendered master titles in respect of the lands into individual land titles.

[59] The subsidiary may now sell all or any part of the ten lots, especially in light of the fact that the individual titles to each of the ten lots have been issued. the company can then demand for repayment of the amount owing as and when the subsidiary sells all or any part of the ten lots pursuant to the understanding aforesaid.

[60] Accordingly, based on the above, it cannot be said that the amount owing by the subsidiary is not recoverable and or ought to be impaired at all.

[61] In fact, the plaintiff has not denied that she is aware of the said underlying arrangement between the company and the subsidiary and the fact that the titles to the ten lots remain registered in the name of the company. In any case, no facts contrary to the aforesaid arrangement have been put forth by the plaintiff.

[62] Furthermore, since its inception, the company has always provided the necessary financial support for all the subsidiary's administrative expenses since it has no independent source of income of its own. Thus, it must be obvious to the plaintiff that the concerns expressed by the auditors casting doubts on its ability to 'continue as a going concern' is premised on the assumption that the company would not be continuing to financially support the subsidiary. This is hardly the case given that the subsidiary is 100% owned by the company and that it would not be in the interest of the company to withdraw the support.

[63] As such, it seems to me disingenuous for the plaintiff to state that she holds an honest belief that the said sum of RM197,220,150 or a portion of the same owed by the subsidiary ought to be impaired.

[64] As regards the classification of the debt as a 'current asset', the amount

owing by the subsidiary to the company has been recorded as a 'current asset' in the company's audited financial statements since 2004. The company and its board of directors were advised by the company's appointed auditor for each of the financial years that the said amount owing could be classified as a 'current asset'. The company's accounts for all these years were audited and signed off without any qualification by the auditor(s).

[65] The plaintiff's lack of good faith is demonstrated by the fact that the plaintiff herself had also approved the company's audited accounts for the financial years ended 31 December 2004 until 31 December 2006. The plaintiff did not raise any questions as to the classification of the amount owing by the subsidiary at the material time. It was not until the plaintiff (and her children) had become hostile towards the company and/or its directors that the plaintiff began to make adverse allegations, such as those attacking the accounts herein, against the company.

[66] The company's position taken in AFS 2017 and AFS 2018 is further bolstered by the defendants' expert's conclusion that the amount owing by the subsidiary is recoverable. The defendant's expert is only of the opinion that the amount would be more appropriately classified as a 'non-current asset' on the basis that it is not likely that the amount would be realised within 12 months from the reporting date. However, this has no material impact on the solvency of the company when the distribution was declared in December 2018.

Misstatement in classification of completed properties as 'inventories'

[67] The plaintiff contended that classification of the completed units in the company's development as 'inventories' is wrong. It is said that because the company has been reporting rental income, the completed units generating the said rental income ought to be classified as 'investment property' instead of 'inventories'.

[68] However, there are rooms for a different opinion on the correct accounting treatment for these completed units.

[69] The company is primarily involved in the business of property development. The completed units recorded as 'inventories' in the company's AFS 2017 and AFS 2018 are the units which had been completed by the company for sale. These units are the company's 'stock in trade' and are not to be retained as long-term assets or for investment purposes.

[70] Pending the sale of these completed units, the company decided to enter into short-term rental/tenancy arrangements in respect of some of the vacant units in order to yield income. There is no dispute that this is a commercial

decision of the company and was taken bona fide in the best interest of the company. Occasionally, some of these completed units would be sold to the tenants and or sold to other third parties with an existing tenancy arrangement (if any).

[71] The mere fact that the completed units had been generating rental income does not negate the company's intention to sell those units or automatically turns those units into units held for investment.

[72] Given the aforesaid, the company and its board of directors were advised by the company's appointed auditor for each of the relevant financial years that the completed units are to be classified as 'inventories'.

[73] The position taken by the company in AFS 2017 and AFS 2018 in classifying the completed properties as 'inventories' is also supported by the defendant's expert's opinion. In this regard, the defendant's expert has pointed to the following premise of the plaintiff's expert's disagreement:

(a) the BTMHG reports had based its' opinion on the MFRS guidelines, which is not the guidelines applied by the company and which the company is not bound to refer or apply; and

(b) BTMHG contended that because the company sold only six units in 2011, four units in 2012 and eight units in 2013, this indicates that the company intended to hold them for capital appreciation. However, according to the company's expert, the aforesaid fact is clear intention of the company not holding these units for capital appreciation but to sell the units. Although 'investment property' specifically includes property held to earn rentals, the fact that a unit is being rented out while it is being marketed does not automatically mean that it is an investment property. The company clearly did not intend to permanently hold these properties to earn rentals.

[74] In any case, issue pertaining to whether these completed properties ought to be classified as 'inventories' or 'investment properties' are matters in which the directors of the company are entitled to rely on professional or expert advice. Section 215(1)(b) of the CA 2016 expressly stipulates that:

> 215(1) A director in exercising his duties as a director may rely on information, professional or expert advice, opinion, reports or statements including financial statements and other financial data, prepared, presented or made by —
>
> (a) ...
>
> (b) as to matters involving skills or expertise, any other person retained by the company in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence.

[75] There is no evidence adduced by the plaintiff that the first to sixth defendants had no reasonable grounds to believe that the company's professional financial advisors were incompetent and or that there were reasonable grounds to believe that the completed properties ought not to have been classified as 'inventories' in AFS 2017 and AFS 2018.

Misstatement in classification of amount owing to shareholders as 'non-current liability'

[76] According to the plaintiff, the amounts stated as owing to the shareholders from the company ought not to have been classified as 'non-current liability' as the accountants have in the explanatory notes to AFS 2017 and AFS 2018 stated that these amounts are 'payable on demand'.

[77] In this regard, it is common ground that the classification of the shareholders' advances depends on whether the advances are in fact repayable on demand. This is in fact a 'live' issue in, amongst others, the Kuala Lumpur High Court Suit No 22NCC-674–12 of 2019 ('Suit 674') and the Kuala Lumpur High Court Suit No WA-22NCvC-887–12 of 2017 ('Suit 887') which are legal actions filed by the plaintiff and the Estate of Dato' Tan respectively seeking the repayment of their respective sums of RM1m and RM14m being advances which they claim are repayable on demand.

[78] It is not disputed that in the company's AFS 2018, whilst listing the item of shareholders' advances as being 'non-current liability', it has a corresponding note that said they were 'repayable on demand'. The two are simply inconsistent.

[79] the company's position in Suit 674 and Suit 887, through the witness statement of the auditor as filed and served, is to the effect that there was an inadvertent error in relation to the note in AFS 2018. That inadvertent error has since been rectified in AFS 2019. It cannot be gainsaid that all these live issues are best reserved for Suit 674 and Suit 887.

[80] In fact, this is an instant that amply demonstrates the plaintiff's bad faith in raising this as a misstatement on the classification of the amount owing to shareholders.

[81] As may be seen from both the plaintiff's and defendants' respective expert reports, the question as to whether the amount owing by shareholders ought to be classified as a current or non-current liability depends on the existence of otherwise of a mutual understanding amongst the shareholders.

[82] It is the company's position that the advances would only be repaid to the shareholders: A

(a) when there are adequate and/or surplus funds in the company;

(b) when the shareholders intimate their collective wish to the board of directors that they wish to be repaid their advances; and B

(c) such repayments are ultimately dependent upon the decision to be made by the board of directors depending, amongst others, on the state of performance of the company at the material time.

('the mutual understanding'). C

[83] As stated, the existence or otherwise of the mutual understanding is a live issue which is pending determination before the courts in Suit 674 and Suit 887. This is a fact known to the plaintiff even prior to the filing of this leave application. D

[84] In fact, these shareholders advances have been classified as the company's long-term and/or non-current liability since 2002 and before Dato' Tan's demise, yet the plaintiff did not previously raise any complaints as to the classification. E

[85] More significantly, the plaintiff had affirmed a joint affidavit in the Companies Winding Up No D1-28–794 of 2003 ('the winding up suit') stating to the effect that, amongst others, there was a mutual understanding between the shareholders of the company on the terms of repayment of the shareholders' advances. F

[86] The High Court in the winding up suit had in fact found that there was an understanding or arrangement that the shareholders advances would only become due and payable when there were surplus funds in the company. The winding up suit was a winding up petition filed by one of the shareholders seeking the repayment of his advances. In that case, the High Court observed that the remaining shareholders cum directors had opposed the petition filed. Crucially, the plaintiff herself had opposed the petition based on the mutual understanding. G H

[87] Thus, the plaintiff is now taking a position that is inconsistent with the position she took on affidavit previously as to the existence of the mutual understanding. I

[88] Given the aforesaid, it is difficult to appreciate that the plaintiff holds an honest belief that the first to sixth defendants have made deliberate misclassification of the amounts owing from the shareholders as 'non-current

liability' when she has full knowledge of the company's reliance on the mutual understanding in response to the claims made in the Suit 674 and Suit 887 and her own position taken in the winding up suit.

Misstatement in stating that the dividends were distributed under 'cash flow balance'

[89] Another of the plaintiff's specific complaints are in relation to alleged misstatement of the dividends declared to all shareholders in December 2018. The plaintiff contended that the dividends declared to all shareholders were wrongfully recorded under the cash flow balance of the company's AFS 2018 and instead, the dividends which were declared to her and the estate of Dato' Tan ought to have been reflected as 'current liabilities'.

[90] At the outset, the plaintiff's complaint, at its highest, does not change or alter the company's ultimate financial position for, amongst others, the following reasons:

(a) the dividends sums of RM1,010,500 and RM10,509,200 due to her and the estate of Dato' Tan respectively (totalling RM11,519,700) is presently reflected as a reduction in the company's current asset;

(b) what the plaintiff is proposing is merely a movement of the said sums of the RM1,010,500 and RM10,509,200 from current asset to current liability; and

(c) the company's net current asset value (derived by current asset minus current liabilities) will remain the same regardless of which approach is taken. This is because the move of the said sums to current liabilities would entail a corresponding increase in the sum in the current assets.

[91] In any event, I agree with learned counsel for the defendants that the plaintiff's complaint in this regard is entirely contrived.

(a) cheques in the sum of RM10,509,200 and RM1,010,500 were in fact issued by the company in the name of Dato' Tan's estate and the plaintiff respectively on or around 12 December 2018. These cheques were valid for a period of six months;

(b) the company and its board of directors were advised by the company's appointed auditor for AFS 2018 that:

(i) as the cheques issued to Dato' Tan's estate and the plaintiff were still valid for the period of the financial year, the cheques were treated as unpresented cheques;

(ii) the appropriate accounting treatment for unpresented cheques is to present and/or reflect the same in the company's cash flow. This is

because the sum stated in such unpresented cheques could be paid out by the company at any time during the period within which the cheques are valid; and

(iii) thus, the total sum of the dividends to be paid out by the company was recorded under the presentation of the company's cash flow in the AFS 2018.

(c) the record and/or presentation of the dividends to be paid out by the company in the company's cash flow for AFS 2018 is not a record or statement that the whole sum of RM20,210,000 had in fact been paid out by the company;

(d) when it became apparent that the plaintiff had no intention to collect the dividends which are due to her, the company then recorded those dividends as a current liability in the company's audited financial statement for financial year ended 31 December 2019 ('AFS 2019'); and

(e) the company and its board of directors were advised by the company's appointed auditor for AFS 2019 that this accounting treatment is in the light of the fact that the cheque issued to her in 2018 had expired coupled with the plaintiff's conduct in refusing to collect her dividends notwithstanding that a new cheque had been issued by the company to her name.

[92] It is the opinion of the defendant's expert that there is no necessity or accounting requirement for amounts represented by unpresented cheques to be treated as a current liability. This position is not refuted by the plaintiff's expert. This being the case, it cannot credibly be said that there is any material misstatement in reflecting the dividends declared under cash flow balance of the company's AFS 2018.

[93] The next issue is whether the subsequent expiry of the unpresented cheques after the financial year ended 31 December 2018 but before the date of the AFS 2018 should have been taken into consideration. The plaintiff's expert suggests in the affirmative and opines that as a result, the amounts ought to have been reflected as current liabilities. However, the plaintiff's expert's opinion fails to appreciate or consider, either sufficiently or at all, the following factors:

(a) the fact that it was always the intention of the company to pay out the dividends declared to the shareholders, even as at the date of the AFS 2018; and

(b) any expired unpresented cheques can be replaced and in this case, the cheques were in fact replaced and reissued.

[94] Thus, given the aforesaid, suffice it to state that the entire complaint relating to the alleged misstatement of the dividends is of little if at all no consequence to the company's financial position.

No material misstatements in the directors' report, statement of directors, statutory declaration and unqualified auditors report

[95] Premised upon the above, it is the judgment of this court that the plaintiff's specific complaints on there being alleged misstatements in the directors' report, statement of directors, statutory declaration and unqualified auditors report for AFS 2017 and AFS 2018 are, with respect, untenable.

[96] The plaintiff's leave application rests entirely on the BTMHG reports. However, the court must exercise some cautions with regard to the BTMHG reports, as correctly highlighted by learned counsel for the defendants, namely:

(a) the scope of engagement was essentially to provide an opinion on a set of pre-determined and carefully crafted queries (see: section 1.2(j) of BTMHG first report);

(b) the scope of engagement is not an audit or audit-related service (see: section 1.2 of BTMHG first report);

(c) the premise of the report was limited by the information and documents provided by the plaintiff (see: section 1.2 of BTMHG first report). In this regard, from BTMHG's scope of work and sources of information, it is apparent that the plaintiff did not furnish sufficient or complete information/documents to BTMHG. For example, there are gaps in terms of the company's audited financial statements provided to BTMHG. The missing years included the company's audited financial statements from years 2001 to 2006, which the plaintiff had herself as a shareholder approved and adopted (see: section 1.2 and 1.3 of BTMHG first report; company's members' resolutions and minutes of meetings for years 2000 to 2019)

(d) in terms of subsidiary, the company's wholly owned subsidiary, its AFS 2007 was furnished to BTMHG but not AFS 2006 (see: section 1.3 of BTMHG first report) This is despite the plaintiff having possession of the subsidiary's AFS 2006, which was exhibited in her affidavit in support dated 27 November 2020 as exh P20. the subsidiary's AFS 2006 would already show the issue of an ongoing concern being flagged out. But, submissions were made to this court so as to give a very different impression and colour on this issue of an ongoing concern to the effect that 11 years of AFS were done from 2007 in one shot and that it was a material change in circumstances;

(e) it is also apparent that the report is limited in that no enquiry and/or clarification was sought or undertaken with the company. BTMHG assumed the truth of the plaintiff's assertions. For instance, the defendants' expert (BDO) in their report exhibited an affidavit affirmed by, amongst others, the plaintiff in 2003 which points towards the existence of the mutual understanding. However, BTMHG in accepting the plaintiff's representation to the effect that there was a change in circumstances between 2004 to 2017/2018, opined that the facts and circumstances of the case back in 2004 may not be relevant to the current situation (see: section 2.4 of BTMHG second report); and

(f) additionally, the opinion expressed by BTMHG in relation to the queries also appears qualified and/or not conclusive/final through the use of words such as 'appears', 'potential understatement' and words of such like (see as eg: section 3.1 of BTMHG first report)

[97] Given the aforesaid and upon assessing, evaluating and scrutinising both the BTMGH's reports and the BDO reports, it is clear that there is insufficient material to establish the element of honest belief on the part of the plaintiff that the company has a cause of action with a reasonable prospect of success based on substantial grounds which is a part of the requirement of good faith under s 348(4)(a) of the CA 2016.

EXISTENCE OF COLLATERAL PURPOSE

[98] There is also ample evidence that the plaintiff's leave application herein is motivated by a collateral purpose.

[99] To appreciate the collateral purpose, it is necessary to provide the larger factual backdrop and some material information on the multiple legal proceedings currently pending and continuing between the plaintiff and the defendants.

[100] As alluded to above, this action is filed on the back of a series of ongoing litigation which include an earlier action brought by the company and the first defendant for forgery of a will propounded by the plaintiff and her children over the assets of her late husband, Dato' Tan.

[101] The plaintiff's children, Tan Ai Lin and Tan Ruy Mun had obtained a grant of probate on 30 March 2018 vide Kuala Lumpur High Court Originating Summons No WA-32NCvC-378–03 of 2018 ('OS 378') in respect of Dato' Tan's estate. Pursuant to the grant of probate, Tan Ai Lin and Tan Ruy Mun had been appointed as the executors and trustees of Dato' Tan's estate.

[102] The executors had demanded that the company's company secretary register the transmission of all the shares in the company registered in the name of Dato' Tan to the names of the executors failing which they would commence legal proceedings and or lodge complaints against the company secretary with the relevant authorities.

[103] The executors, whether by themselves or through their solicitors, also sent a spate of letters to the company as follows:

(a) by letter dated 30 May 2018, solicitors for the executors demanded that the company cause and or procure its company secretary to register the transmission of Dato' Tan's shares in the company to the names of the executors failing which they would commence legal proceedings against the company and or its directors;

(b) by letter dated 1 June 2018, the executors, through their solicitors, claimed that the company and its directors were in breach of the law and that their solicitors have instructions to commence legal actions;

(c) by letter dated 7 June 2018, the executors sought to nominate themselves, the plaintiff and one Tan Sha Lin (the plaintiff's youngest daughter) to be appointed as additional directors in the company. This was not acceded to by the company;

(d) by another letter dated 7 June 2018, the executors informed the company of their claim that the shares held by, amongst others, the first to fourth defendants in the company were held on trust for Dato' Tan's estate. By the said letter, the executors sought to give the company notice to not deal with any of the shares alleged to have been held on trust for Dato' Tan's estate without their written consent; and

(e) for completeness, the allegation that there were shares held on trust for Dato' Tan's estate was refuted and denied by the relevant shareholders. the company took the position that this is a matter between the executors and the said shareholders.

[104] On or around 12 June 2018, the company informed the executors, amongst others, that the company had reasons to doubt the authenticity of the will. In this regard, the company took the position that it would not deal with the shares within the company and would keep the nomination of additional directors in abeyance pending further discussion and determination. This position was again reiterated to the executors vide letter dated 25 June 2018 sent by the company through its solicitors.

[105] Thereafter, on or around 17 August 2018, the company and the first defendant filed the citation referred to above which led to the executors

depositing the original grant of probate at the Kuala Lumpur High Court Registry on or around 12 September 2018.

[106] the company and the first defendant then commenced the Suit 662 against the executors, Tan Sha Lin and the plaintiff herein as purported beneficiaries of the will.

[107] At such, when this action was initiated in 2020, the plaintiff's children had already attempted once to be appointed onto the board of directors of the company and Suit 662 was already afoot. The trial of Suit 662 is currently ongoing.

[108] Via Suit 662, the company and the first defendant are challenging the validity and propriety of the will and grant of probate. In essence, the company and the first defendant contend, amongst others, that the will is a forgery and/or a falsification and there are circumstances surrounding the existence of the will which would excite the vigilance and/or suspicion of the court as pleaded in the statement of claim.

[109] The following events also transpired in the course of Suit 662:

(a) pursuant to two orders respectively dated 4 January 2019 and 14 February 2019, the respective experts of the plaintiffs and defendants therein had separately conducted forensic inspections of the Will said to be the original will which was deposited with the Kuala Lumpur High Court for purposes of obtaining the grant of probate;

(b) in the course of the forensic inspection, Mr Chris Anderson, the expert appointed by the defendants in Suit 662 (including the plaintiff herein), informed that the will produced by the court for his inspection was not the original will but a toner based copy. This was confirmed by the company's expert;

(c) subsequently, there was a series of correspondence between the High Court and the solicitors for the defendants in Suit 662 wherein the following positions have been taken:

(i) the court's position is that the document produced for Mr Chris Anderson's inspection was the document which it received and/or which was deposited with the court for purposes of obtaining the grant of probate; and

(ii) the defendants in Suit 662 however dispute the court's position and allege that they had handed the original will with the Kuala Lumpur High Court Registry during the hearing of the application for the purported grant of probate;

(d) in the circumstances, the company lodged a police report concerning the aforesaid events on 22 February 2019;

(e) as matters stand, there is no original will. The existence or otherwise of an original will is a live issue to be determined in Suit 662;

(f) having considered, amongst others, the events aforesaid, the court in Suit 662 granted the company and the first defendant's injunction application as against the defendants therein on 3 February 2020. Pursuant to the said injunction, amongst others, the executors and the purported beneficiaries under the will are restrained from holding themselves out as the executors and/or beneficiaries of Dato' Tan's estate;

(g) additionally, the company and the first defendant have also obtained an order to appoint Mr Lim Tian Huat of Rodgers Reidy & Co as the receiver and manager ('R&M') over Dato' Tan's estate upon terms pending the determination of Suit 662;

(h) the injunction order and the R&M order are presently pending appeal at the Court of Appeal; and

(i) at the same time, it also appears that the purported executors are now seeking to remove the court appointed R&M and to replace him with a candidate of their choice.

[110] In addition to the above, part of the issues raised with regard to the company's accounts is the subject matter of Suit 674 and or Suit 887. In this regard:

(a) the plaintiff through Suit 674 is claiming for, amongst others, the repayment of her shareholders' advances in the company which she alleged is repayable on demand;

(b) the plaintiff's children, being the purported executors, had also filed Suit 887 to claim for, amongst others, the repayment of Dato' Tan's shareholder/director advances in the company which they alleged is repayable on demand; and

(c) the company has filed a defence and counterclaim in both Suit 674 and Suit 887. Broadly speaking, the company's defence in Suit 674 and Suit 887 is that the shareholders' advances in the company are unsecured, interest free and without a fixed term of repayment. Repayment of the advances is subject to the mutual understanding.

[111] Learned counsel for the defendants contended that that the leave application herein is filed by the plaintiff with the collateral purpose to disrupt the affairs and/or management of the company and or to further the claims filed by the plaintiff and the executors in Suits 674 and 887.

[112] In my judgment, there is indeed sufficient evidence to suggest that the leave application is filed with a collateral purpose. Significantly, in the leave application, the plaintiff is also seeking by way of ancillary orders the following reliefs:

(a) the plaintiff is seeking an ancillary order for, amongst others, the company's directors, auditors and solicitors to disclose and provide full information concerning the affairs of the company as well as unlimited and full inspection of the company's books and records. Part of the information sought may be protected by legal professional privilege, including but not limited to any information passed between the company and its solicitors in respect of Suit 662 and/or Suit 674 wherein the plaintiff is an opposing party thereto; and

(b) additionally, the plaintiff is also seeking an ancillary order for, amongst others, the solicitors to be appointed by them to conduct the proposed derivative action (in the event leave is granted) to receive duplicate or make clear copies of the documents aforesaid to be used in all or any of the court proceedings against the company's directors as well as other third parties not named in the plaintiff's originating summons. This clearly smack of the plaintiff's collateral purpose and bad faith.

[113] In addition to the above, the proposed reliefs to be sought on behalf of the company in the event leave is granted is also targeted at furthering the plaintiff's and or the executors' collateral purpose of taking over control of the company.

[114] In this regard, the plaintiff is proposing to seek for, amongst others, an order that the second and sixth defendants be removed as directors of the company and that the plaintiff and or her nominees be appointed as directors of the company.

[115] Such a proposed derivative action is an attempt to sidestep the proper mechanism for the appointment and removal of directors in the company.

[116] Plainly, the plaintiff's application herein is calculated to further a dispute or to create controversy for purposes of, amongst others, advancing her own interests and/or the interests of her children (including the executors).

[117] I agree with learned counsel for the defendants that the plaintiff is using this action to champion her and/or her children's (including the executors' personal agenda), be it to put pressure on Suit 662 or to bolster the positions in the Suit 674 and/or Suit 887.

[118] By reason of the matters aforesaid, the plaintiff's contention as to her honest belief and bona fide is suspect. It is my judgment that there is no such honest belief on the part of the plaintiff as this action is laced with a collateral purpose on the part of the plaintiff.

DERIVATIVE ACTION NOT IN THE BEST INTEREST OF THE COMPANY

[119] Quite apart from the aforesaid, it is also my judgment that the proposed derivative action is prima facie not in the best interest of the company at all.

[120] The plaintiff's proposed derivative action is premised upon the claim that the company was not solvent in the sense that the company was not able to pay its debts as and when the debts become due within 12 months immediately after the distribution if made. This is based on s 132(3) of the CA 2016.

[121] The distributions were declared by the company in December 2018 to all the shareholders of the company, including the plaintiff and Dato' Tan's estate.

[122] The plaintiff's refusal to collect the dividends which had been declared does not detract from the fact that dividends had been declared and made to the shareholder of the company and for their benefit. Further, the company has also paid out dividends in the sum of RM10,509,200 to the R&M on or around 29 June 2020.

[123] What is significant is the fact that right up to the time of the hearing of this leave application, there is no evidence at all that company has not been able to pay its debts as and when its debts become due since December 2018.

[124] Indeed, when learned counsel for the plaintiff was asked whether any shareholders and or creditors have been prejudiced by the declaration of the dividends, he candidly acknowledged that there is none but insisted that the proposed derivative action is necessary as a contravention of ss 131(1) and 132 of the CA 2016 has been done.

[125] Yet, by way of the proposed derivative action, the plaintiff would have the company take and formally adopt the plaintiff's position that it is liable to make the repayment of shareholders' advances even though the company is maintaining a diametrically opposite position in Suit 674 and/or Suit 887 which are still pending before the courts.

[126] Further, in the plaintiff's proposed derivative action, the company

would be constrained to take and formally adopt the position that it was indeed insolvent at the time the distribution was made in December 2018.

[127] It cannot be said that such an admission of insolvency by the company would be in the company's best interest, more so given the pending Suit 674 and Suit 887.

[128] The aforesaid would entail the company taking diametrically opposing views of its experts pertaining to the plaintiff's allegations that there are material misstatements as to the company's audited financial statements. the company would be put by the plaintiff to admit the purported misstatements in its financial statements when it is the company's position at all times that there are no misstatements at all. Plainly, this is incompatible with the company's best interest.

[129] Furthermore, it cannot be said that the company has suffered any loss by reason of the distribution.

CONCLUSION

[130] Based on all of the foregoing, it is my judgment that the plaintiff has failed to meet the requisite threshold such as to warrant the granting of leave by this court.

[131] For the reasons above, encl 1 is dismissed with costs.

Application dismissed with costs.

Reported by Ashok Kumar